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HAROLD B. WILLEY, Cle

In the Supreme Court of the United States

OCTOBER TERM, 1954.

No. 336.

LAMBROS G. METRAKOS,
Petitioner,

vs.

NEW YORK CENTRAL RAILROAD CO. (Dismissed below),
THE CLEVELAND UNION TERMINALS COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit.

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondent prays that the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in said Court, *Lambros G. Metrakos v. New York Central Railroad Co.* (dismissed below), *The Cleveland Union Terminals Company*, on June 17, 1954, be denied.

COUNTER-STATEMENT OF THE QUESTION PRESENTED.

In the absence of any objection by plaintiff's counsel to the claimed error until the case was appealed to the United States Court of Appeals for the Sixth Circuit, did the United States District Court trying this case under the provisions of the Federal Employers' Liability Act commit prejudicial error when he charged the jury four distinct times that the plaintiff must establish the negligence of the defendant by a preponderance of the evidence and once that the plaintiff must establish "to your satis-

faction by a preponderance or the overweight of the evidence that the defendant was negligent"?

COUNTER-STATEMENT TO PETITIONER'S STATEMENT AND FACTS.

Petitioner states at page 2 of his Petition that plaintiff's "foot slipped on the soapy, littered floor, with the result that he suffered a rupture of discs of the vertebrae." Whether the plaintiff in fact slipped and whether the floor contained any foreign matter were questions sharply contested in the trial. This conflict in the evidence is illustrated in the testimony of five witnesses (C. R. 7a to 17a, inclu.)* and in the cross-examination of one of the plaintiff's doctors (C. R. 1a, 2a). This testimony is clearly contradictory to any claim of slipping. Furthermore, the testimony (C. R. 10a, 11a), of the car cleaner, Nick Bellino, working with the plaintiff, contradicts plaintiff's assertion that the floor was slippery. In fact, Bellino testified that the floor was dry.

Petitioner's statement of facts, at page 4 of his Petition, states that the water could not be drained from the tank because of the condition of the spigot of the tank. Frank L. Frerichs, General Foreman of the defendant, testified that in his twelve years experience as Superintendent, he had never known of a tank being plugged up but that there are lids on the top of the tanks which the workmen could remove and tip the tank to drain it into a bucket. (C. R. 18a to 20a.)

This testimony is referred to in this counter-statement because it afforded part of the ample evidence on which

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* All references to the Certified Record in this brief are to the Appendix of the brief of the Defendant-Appellee in the Court of Appeals.

the jury could and did find the defendant free from negligence.

REASONS FOR DENYING THE WRIT.

1. The Charge of the Trial Court Was Not in Error.

In its charge to the jury the Court stated five different times that the plaintiff must establish his case by a preponderance of the evidence and in some detail defined preponderance of the evidence. The pertinent parts of the charge are here quoted from the transcript for the convenience of the Court.

> "The Court: * * * (326) In order for the plaintiff, Lambros Metrakos, in this case to recover (327) for his damages from the defendant, the Cleveland Union Terminals in the present case, it is necessary under the terms of this statute that he establish by a preponderance of the evidence that the defendant, and its agents or employees, or its agents and employees, were negligent, and that such negligence was the proximate cause of the accident and injuries sustained by the plaintiff.
>
> "In the course of my addressing you I shall refer at greater length both to the matter of preponderance of evidence and the term 'negligence' and the meaning of both of those terms.
>
> * * * * *
>
> "(330) The burden of proof in this case, as in all cases of a civil nature, is on the plaintiff to prove by a preponderance of evidence all the essential and the material claims made by the plaintiff in his bill of complaint or in the complaint addressed to the Court, and which the defendant denies in its answer, in order that he may be entitled to a verdict in his favor at your hands.
>
> "By a burden of proof, members of the Jury, is meant the duty of producing sufficient evidence to

lead you to believe that the facts are as the one who has the burden claims them to be.

"By a preponderance of the evidence I mean an overweight of the proof. This does not necessarily mean that one side is required to have more witnesses than the other. It is well to place the evidence, as it were, on a pair of scales in your minds, and by so doing determine in whose favor the evidence (331) preponderates. And if the evidence in support of the plaintiff upon the issues as I have stated them to you weighs more heavily in the plaintiff's favor then the preponderance is in his favor. If the evidence is equally balanced, then it may not be said that it preponderates in plaintiff's favor. I repeat, if the evidence is equally balanced then it may not be said that it preponderates in plaintiff's favor.

* * * * *

"(348) Now before you arrive at a verdict in this case you will proceed to examine whether or not the plaintiff has established to your satisfaction by a preponderance or the overweight of the evidence that the defendant was negligent in the respects claimed or contended for by the plaintiff or in any one of the respects claimed or contended for by the plaintiff.

"Negligence, as the term is used in the instructions to you, Ladies and Gentlemen, means the failure to use ordinary care. Ordinary care, of course, depends on the circumstances of each particular case. Ordinary care is described usually, almost in a stereotype form, as such care as a person of ordinary prudence would use or exercise under the same or similar circumstances having regard for the things to be accomplished and the rights of any persons who have relation to those things.

"(349) If by a preponderance of the evidence you find the defendant was negligent in any one or more of these particulars claimed by the plaintiff you are required to determine, of course, whether or not that

negligence was the direct and proximate cause of the injury, loss and damage concerning which the plaintiff complains. The word 'proximate' I use in contrast to the word 'remote.' A proximate cause is the real cause. What was the real cause of this accident? Was the defendant guilty of negligence which proximately caused it? If you do find by the preponderance of the evidence that the defendant was guilty of negligence in one or more of the particulars claimed by the plaintiff, and if such negligence was the direct and proximate cause of the injury and loss and the damage sustained by the plaintiff or suffered by the plaintiff, then your verdict will be for the plaintiff and against the defendant." (C. R. 20a, 21a, 22a.)

After the jury had retired to consider the case, it returned for further instructions and in the proceedings at that time Court again referred to the preponderance of the evidence, as follows:

"(355) The Court: Do I understand you have an inquiry to make of some sort?

"The Foreman: Your Honor, the Jury would like to make this inquiry: they are of the opinion—

"The Court: Don't express an opinion. You may make an inquiry as to any proposition you want to know, but don't tell us what the opinion is.

"The Foreman: We request to know that if we find no point of negligence on the part of the defendant whether or not there is any way that some compensation can be gotten to the plaintiff, although the Jury cannot find any point of negligence?

"The Court: Well, I have instructed you that the only basis or the only right of recovery is if you find by a preponderance of the evidence that the defendant was guilty of negligence in some respect. You don't have to find that the defendant was guilty of all the charges of negligence. If you find that the defendant was guilty of any negligence claimed then there is a

right of recovery, but the Jury must find the defendant was guilty of negligence in one or (356) more of the respects claimed by the plaintiff.

"Does that answer your question?

"The Foreman: Thank you, I think it does.

"The Court: Any objection to that, Mr. Sindell?

"Mr. Sindell: No.

"The Court: You may retire." (C. R. 22a.)

The third time that the Court referred to the preponderance of the evidence, it will be noted from the above quotation, he charged that the jury should examine "whether or not the plaintiff has established to your satisfaction by a preponderance or the overweight of the evidence that the defendant was negligent in the respects claimed or contended for by the plaintiff or in any one of the respects claimed or contended for the plaintiff." This is the part of the charge on which petitioner bases his claim of error.

The Court had previously defined the preponderance of the evidence by the metaphor of a pair of scales balancing the evidence on both sides to determine in whose favor it preponderates. It must be clear to anyone that the word "satisfaction" as used in context by the Court and qualified by the quantum of proof could mean to the jury only that it must find the scales weighted in favor of plaintiff's contentions. The Court did not charge the jury that it need to be satisfied with the evidence but only that it be satisfied that the evidence preponderated in the plaintiff's favor. When the jury returned for further instructions the charge did not again use the word "satisfaction."

Even were we to assume, that standing alone the language complained of would be error, which respondent does not admit, the question cannot rest there for the fact

is the Court at other times during its charge certainly gave a correct statement of law.

> "We think the question is whether, on the whole, the charge gave the jury the necessary legal instruction and whether it presented to them fairly questions which they had to decide. If it did, we think there is no reversible error even though some portions of the charge might have been improved by polishing and other portions wholly deleted." *Robak vs. Pa. R. Co.*, 178 Fed. 2nd 485, 486.
>
> "It is elementary that instructions must be considered as a whole. Even if a single instruction is erroneous, it does not call for reversal if it is cured by a subsequent charge or a consideration of the entire charge. * * *
>
> "Once the Judge has made an accurate and correct charge, the extent of its amplification must rest largely in his discretion." *Southern Pacific Co. vs. Souza*, 179 Fed. 2nd 691, 694, 695. See also *Moore's Federal Practice*, 2 Ed., Volume 5, page 2503, and *Cyclopedia of Federal Procedure*, Third Edition, Volume 9, pages 382 and 422.

The fact that plaintiff's counsel, listening to the charge with the practiced ear of an experienced trial counsel, raised no objection prior to the jury's retirement or even upon the subsequent return for further instructions, is indicative of the whole effect created upon the jury by the charge. In *Kieffer v. Blue Seal Chemical Co.*, 196 Fed. 2nd 614, the United States Court of Appeals for the Third Circuit said at page 616:

> "If the judge's charge seems to counsel ambiguous as he hears it, he can seek to have it further amplified, revised or amended so that the jury will get a clear picture. But if it is not so confused that the ex-

perienced trial lawyer senses no confusion as it is given, we do not think that because it does not appear sun clear in type thereafter there is a basis for complaint. At the worst this charge was ambiguous, not erroneous. We think that a complaint about it, if there was a complaint, should have been made at the time and the trial judge given an opportunity to clarify his language."

This failure of counsel to object will be further considered in the second branch of this argument but is thought worthy of comment at this point to emphasize the general atmosphere created by the Court's charge.

The petitioner's brief relies largely on the case of *Cincinnati, Hamilton & Dayton Railway Co. v. Frye*, 80 Ohio St. 289. That case is distinguishable from the instant case in that the language described by the Court was the only definition of the burden of proof which the trial Court gave to the jury and that was given several times. The reference to the *Frye* case is misleading for it does not clearly state the Ohio law. In the much later case of *Traveler's Ins. Co. v. Gath*, 118 Ohio St. 257, the Supreme Court of Ohio made the distinction between "satisfy" and "reasonably satisfied by the weight or preponderance of the evidence" and held the latter unobjectionable.

The Ohio law is not pertinent in the instant case in any event. The instant action being under the provisions of the Federal Employers' Liability Act, the Federal law governs the question and not the State law. The doctrine of *Erie Railroad v. Tompkins*, 304 U. S. 64, has no application to a Federal Employers' Liability Act case since such a case arises under an act of Congress, and Mr. Justice Brandeis so stated the rule in that opinion.

2. The Petitioner Having Failed to Call the Claimed Error to the Court's Attention Cannot Raise the Question on Appeal.

At no time during the charge or at its conclusion or even when the jury returned for further instructions, did petitioner's counsel offer the slightest objection to the language in the Court's charge. In fact not even in the eighteen legal size page motion for new trial filed by petitioner's counsel was the so-called error of the charge mentioned.

It is submitted that it is completely settled that objections to the introduction of evidence or to portions of the charge must be made at the time of the offer or of the question or as to the charge at least before the jury retires and must state specific grounds. See for example the very early case of *Patrick vs. Graham*, 132 U. S. 627.

Rule 46 of the Rules of Civil Procedure does away with the necessity of formal exceptions but still requires that counsel make known to the Court his objection to the action of the Court and his grounds therefor. Rule 51 provides that no party may assign as error the giving or failing to give an instruction unless he objects thereto before the jury retires, stating the matter to which he objects and the ground of his objection. Rule 46 should be read in conjunction with Rule 51 and both are matters of substance and not a mere technicality. *Johnston vs. Reily*, 160 Fed. 2nd 249. *Thomson vs. Boles*, 123 Fed. 2nd 487. (Cert. denied, 315 U. S. 804.)

This Court has said in *Palmer v. Hoffman*, 318 U. S. 109, 119:

"In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to

bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial."

See also *Kieffer v. Blue Seal Chemical Co.*, 196 Fed. 2nd 614, *supra*, page 7, *Massachusetts Bonding & Insurance Co. v. Ray Dilschneider, Inc.*, 203 Fed. 2nd 556, *Transamerican Freight Lines, Inc. v. Universal Die Casting Company*, 192 Fed. 2nd 931, *Trowbridge v. Abrasive Co. of Philadelphia*, 190 Fed. 2nd 825 and *Cafasso v. Pennsylvania R. Co.*, 169 Fed. 2nd 451.

CONCLUSION.

The petitioner's statement of facts standing alone would lead to the conclusion there was an obvious miscarriage of justice in this case. The evidence produced at the trial, part of which has been referred to in this brief, tended to refute plaintiff's claims of negligence leaving a question of fact to be decided by the jury. The case was submitted to the jury under instructions which were not objected to at the time of the trial and the jury returned a verdict in favor of the defendant.

Petitioner contends that this result followed from an overburdensome charge. If this is the fact, which respondent denies, would not plaintiff's counsel have been expected to call to the attention of the trial Court an error so obvious as petitioner now contends it was.

Respondent submits that the charge as given in its context was correct but in any event, petitioner cannot raise the question on review having failed to make timely

objection in order that the Court could consider the matter, before the jury retired.

It is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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